JAN 3 2001

No. 99-2047

IN THE

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES, General Treasurer, and COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

BRIEF OF *AMICI CURIAE* NATIONAL WILDLIFE FEDERATION, AUDUBON SOCIETY OF RHODE ISLAND, ENVIRONMENT COUNCIL OF RHODE ISLAND, ENVIRONMENTAL DEFENSE, MUNICIPAL ART SOCIETY OF NEW YORK, NATIONAL TRUST FOR HISTORIC PRESERVATION, NATURAL RESOURCES DEFENSE COUNCIL AND SIERRA CLUB IN SUPPORT OF RESPONDENTS

GLENN P. SUGAMELI
NATIONAL WILDLIFE FEDERATION
1400 16th Street, N.W.
Suite 501
Washington, DC 20036-2266
(202) 797-6865

VICKI L. BEEN
Counsel of Record
C/O NEW YORK UNIVERSITY
SCHOOL OF LAW
40 Washington Square South
Suite 314-H
New York, New York 10012
(212) 998-6223

Attorneys for Amici Curiae

164437

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. PALAZZOLO NEVER FILED A *MEANINGFUL* APPLICATION FOR DEVELOPMENT PERMISSION, BECAUSE HE APPLIED TO BUILD A "BULKHEAD" AND A "RECREATIONAL BEACH FACILITY" RATHER THAN THE RESIDENTIAL SUBDIVISION HE NOW CLAIMS WAS TAKEN, AND HE FAILED TO BUILD A RECORD THAT SHOWS HOW MANY HOME-SITES HE COULD DEVELOP ON THE PROPERTY. 10

A. The Court has consistently required property owners to file a meaningful application for an economically viable project before bringing a takings claim. 10

B. Palazzolo has not submitted even one meaningful application to use the land for residential development, and his

Contents

Page

requests for permits for non-residential development are no substitute because denial of those permits does not reveal the extent of the residential use that the agency will allow. 12

C. Palazzolo's allegation that CRMC's refusal to allow "any" development deprived him of all beneficial use does not excuse his obligation to submit a meaningful application for the development he now claims is the only beneficial use of the property. 16

D. Palazzolo did not prove that a proposal to develop upland portions of the property would be futile. 22

II. SANCTIONING PALAZZOLO'S END-RUN AROUND THE MEANINGFUL APPLICATION REQUIREMENT WOULD UNDERMINE THE EFFICIENCY, FAIRNESS AND ACCURACY OF REGULATORY PERMITTING PROGRAMS .. 24

CONCLUSION 29

TABLE OF CITED AUTHORITIES

Page

Cases:

Agins v. City of Tiburon, 447 U.S. 255 (1980) 10, 11

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 1

Dolan v. City of Tigard, 512 U.S. 374 (1994) 1

Gilbert v. City of Cambridge, 932 F.2d 51 (1st Cir. 1991) 22, 23

Greenbrier, Ltd. v. City of Alabaster, 881 F.2d 1570 (11th Cir. 1989) 19, 20

Greenbrier (Lake County Trust Co. No. 1391) v. United States, 40 Fed. Cl. 689 (1998), *aff'd*, 193 F.3d 1348 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 2740 (2000) 23

Heck v. United States, 37 Fed. Cl. 245 (1997), *aff'd*, 134 F.3d 1468 (Fed. Cir. 1998) 23

Herrington v. County of Sonoma, 857 F.2d 567 (9th Cir. 1988) 22

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 1, 10, 28

Johnson v. Fankell, 520 U.S. 911 (1997) 12

Cited Authorities

	Page
Kaiser Dev. Co. v. City and County of Honolulu, 649 F. Supp. 926 (D. Haw. 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990)	18
Kinzli v. City of Santa Cruz, 620 F. Supp. 609 (N.D. Cal. 1985), *aff'd*, 818 F.2d 1449, *amended by* 830 F.2d 968 (9th Cir. 1987)	18
Kinzli v. City of Santa Cruz, 818 F.2d 1449, *amended by* 830 F.2d 968 (9th Cir. 1987)	18
Larson v. Multnomah County, 854 P.2d 476, *clarified on reconsideration*, 859 P.2d 574 (Or. Ct. App. 1993)	18
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)	1, 27
MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986)	10, 11, 12, 14, 16, 17, 20, 22
Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999)	19, 20
Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)	1
Palazzolo v. Coastal Resources Management Council, 657 A.2d 1050 (R.I. 1995)	6

Cited Authorities

	Page
Paquette v. Zoning Bd. of Review, 372 A.2d 973 (R.I. 1977)	26
Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)	1, 10, 12, 17
San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981)	11
Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997)	1
Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)	10, 11, 12, 17, 18, 20, 22
United States Constitution:	
Fifth Amendment	2, 9
Statute:	
R.I. Gen. Laws § 46-23-1	27

Cited Authorities

Page

Other Authorities:

Christopher City, Note, *Duty and Disaster: Holding Local Governments Liable for Permitting Uses in High Hazard Areas*, 78 N.C.L. Rev. 1535 (2000) 27

Ibbotson Associates, Stocks, Bonds, Bills, and Inflation 1997 Yearbook 21

Brody Mullins, *Property Takings Bill Set For House Fight*, National Journal's CongressDailyAM (Mar. 14, 2000) 20

Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Cal. L. Rev. 837 (1983) 26

Eric H. Steele, *Participation and Rules — The Functions of Zoning*, 1986 Am. B. Found. Res. J. 709 26

Glenn P. Sugameli, *"Takings" Bills Threaten People, Property, Zoning, and the Environment*, 31 Urb. Law. 177 (1999) 20

Senate Committee on the Judiciary, The Private Property Rights Implementation Act of 1998, S. Rep. No. 105-242 (1998) 21

INTEREST OF *AMICI CURIAE*

Amici curiae National Wildlife Federation, Audubon Society of Rhode Island, Environment Council of Rhode Island, Environmental Defense (formerly the Environmental Defense Fund), Municipal Art Society of New York, National Trust for Historic Preservation, Natural Resources Defense Council, and Sierra Club are independent not-for-profit state and national membership organizations dedicated to the wise use and conservation of our cultural and natural resources, including wetlands and other sensitive coastal habitats.[1]

Various of the *amici* have participated in cases defending state efforts to protect wetlands, and have filed *amicus curiae* briefs in takings cases before the Court, including *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

STATEMENT OF THE CASE

Although the Court granted certiorari on three questions, we focus on the question that logically comes first — whether Palazzolo's takings claim is ripe for review. Our statement of the case therefore highlights those facts relevant to the ripeness issue, and our arguments demonstrate that the claim does not satisfy the Court's ripeness requirements. Should the Court nevertheless reach the other questions presented by the Supreme Court of Rhode Island's dicta, we believe the Court should affirm.

---

1. No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici* and their counsel made any monetary contribution to the preparation or submission of this brief. This brief is being filed with the written consent of the parties, which has been filed with the Court.

Anthony Palazzolo owns a parcel containing both uplands and a salt marsh that his own witness described as "extremely valuable in terms of plant species . . . and as a habitat for birds." J.A. 35. Palazzolo filed two half-hearted, incomplete and vague applications with the State of Rhode Island to fill the marsh and build either a bulkhead or a recreational beach facility. During the administrative review of those applications, Palazzolo denied that he intended to use the land for residential development. When regulatory authorities found he had not carried his burden of proof on his applications to fill the marsh, however, he suddenly changed tunes, filing a takings claim alleging that the State had taken his land by not allowing him to build a subdivision of seventy-four homes. He now argues that applications for permits that had nothing to do with residential use of either the uplands or the marsh served to ripen his claim that his interest in residential development was taken.

What is at stake in this case is whether Palazzolo's "hide-the-ball" approach to the permit process will be allowed to undermine well-established legal doctrines the Court has carefully crafted. These doctrines ensure that the courts can accurately assess whether administrative agencies have reached an accommodation between the rights of property owners and the equally important rights of neighbors and the public that does not trigger the Fifth Amendment's compensation requirement.

In 1959, Palazzolo paid approximately $8000 for an undivided one-half interest in a plot of land adjacent to Winnapaug Pond that consisted primarily of salt marsh. Pet. App. B-2. The day after that transaction, Palazzolo and his co-owner transferred the land to Shore Gardens, Inc. (SGI), a corporation for which Palazzolo served as President.[2] *Id.* The property had been platted into residential lots decades earlier, and SGI filed a plat further subdividing the property into eighty residential lots. Pet. App. A-3. Over the following two years,

2. In 1969, SGI acquired the remainder of the plot at issue here for another $5000. Pet. App. B-12.

SGI transferred eleven of the lots to others for consideration that is not disclosed on the record. J.A. 76-79.

In 1962, SGI applied to the Division of Harbors and Rivers (DHR) of the Rhode Island Department of Natural Resources for permission to dredge Winnapaug Pond and to fill the salt marsh "to make it adaptable for useful development." Pet. App. B-2. The following year, after DHR returned the application because it was incomplete, SGI submitted another application, seeking permission to dredge the pond, fill the property, and construct a bulkhead. *Id.* In 1966, SGI submitted yet another application, again to dredge and fill, this time for the purpose of constructing a "recreational beach facility." *Id.*

In 1971, DHR first approved the applications, then quickly revoked that approval. *Id.* at B-2 to B-3. SGI let the matter drop, and never appealed the denial or pursued other development options. In 1978, Palazzolo became the owner of the property because the Rhode Island Secretary of State revoked SGI's corporate status. *Id.* at B-8. In the intervening years, DHR's successor agency, the Coastal Resources Management Council (CRMC) adopted a Coastal Resources Management Program ["Regulations"], which generally prohibits the filling of coastal wetlands. Resp't App. A-19.

Under the Regulations, Palazzolo's property is defined as a "developed barrier beach" and "coastal wetlands" in a "Type II" water. *Id.* at A-15 to A-16. Fill is prohibited in the coastal wetlands "unless the primary purpose of the alteration is to preserve or enhance the feature as a conservation area" or "unless [fill is] a consequence of an approved mosquito-control ditching project." *Id.* at A-19. Residential structures are allowed, however, on developed barrier beaches, subject to CRMC "assent." *Id.* at A-16. The Regulations require that an applicant for CRMC's assent to residential structures obtain various "prerequisites" before filing the application, including "a local building permit or a letter from the building inspector stating that all local requirements will be met and a permit will be issued," and either a permit from the Department of Environmental Management if the homes will be serviced by

individual sewage disposal systems (ISDS) or confirmation that connections to public water supply and sewer systems will be available. *Id.* at A-19 to A-20.

Section 130 of the Regulations gives CRMC limited flexibility to grant a "special exception" to the prohibitions against fill. An applicant for such an exception must demonstrate that "[t]he proposed activity serves a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests," and is either related to a public infrastructure project, "a water-dependent activity that generates substantial economic gain to the state," or "an activity that provides access to the shore for broad segments of the public." *Id.* at A-13. Further, the applicant must show that "all reasonable steps shall be taken to minimize environmental impacts" and that "[t]here is no reasonable alternative means of, or location for, serving the compelling public purpose." *Id.*

In 1983, Palazzolo sought a special exception from CRMC under § 130, submitting an application nearly identical to SGI's 1963 application, and requesting permission to "restore property line, protect and prevent further erosion, to fill property to elvation[sic] 6.5 ft, to prepare property for use as designated by zoning regulations . . . and construct bulkhead . . . ." J.L.1 tab 5. CRMC's biologist recommended that the special exception be denied, noting that "the applicant has made no attempt to provide information to support the need or justification for the alteration sought." J.A. 4. Similarly, CRMC's engineer recommended that the special exception be denied, after first noting that the drawings were "very vague and inadequate" and the "plans very poor," despite the staff's efforts to obtain better documentation from Palazzolo. *Id.* at 7. The engineer highlighted, for example, that Palazzolo had not provided necessary information about "final grades and contours," and had not addressed "impacts from runoff, flooding, and biological concerns." *Id.* at 8. The engineer also noted that the proposal might be internally inconsistent, because it stated that "no sewage disposal systems are being applied for," but also proposed to "prepare property for use as designated by zoning

regulations," even though one of the uses allowed under the property's "W1, Residential and other" zoning was residential, which obviously would require a disposal system. *Id.*

At the public hearing on the application, Palazzolo was questioned about his development plans. Palazzolo replied that "I can honestly say I spent twenty years trying to get to the first stage. I haven't given serious thought to the second stage . . . ." J.A. 11. When asked whether he would build on the fill, he replied "not necessarily." He then explained that he sought to fill the land "because it's my right to do if I want to . . . ." *Id.* Asked if the land would pass percolation tests,[3] Palazzolo responded "it is not necessary at this time. It would be necessary if I said I wanted to build houses. I am not saying that." Resp't App. A-24.

Not surprisingly, CRMC denied the permit, after reciting the many inadequacies in the documentation provided with the application, and the "complete lack of evidence demonstrating to this Council the need and demand for the proposed activity." J.A. 16-18.

Palazzolo's next application, in 1985, also was half-hearted. Although CRMC's engineer's field report for the 1983 application had noted that the soil was unsuitable for road or other fill, Palazzolo proposed a 50-car parking lot, along with picnic tables, barbecue pits and a trash dumpster, to form a "recreational beach facility." Pet. App. B-3. The application again was "extremely vague" and "rudimentary," J.A. 61-62, and Palazzolo's defense of the proposal was desultory, at best. Palazzolo's engineer acknowledged the environmental harm the fill would cause, and conceded that the beach club was not necessary to provide public access to the pond. *Id.* at 34. Palazzolo also called as a witness an expert in environmental plant physiology, who testified that the land is "an extremely valuable salt marsh and should be preserved." *Id.* Again, CRMC predictably denied the application. *Id.* at 35.

3. Percolation tests measure the absorption and drainage characteristics of land to determine whether it is suitable for septic systems.

Palazzolo then began several leisurely legal challenges to the denial. In April 1986, he filed an appeal from CRMC's decision. The appeal languished until 1993, when Palazzolo first attempted to withdraw the appeal, then changed his mind. *Id.* at 32. Judge Israel of the Rhode Island Superior Court upheld CRMC's 1985 decision, finding that the decision "was based on the plain weight of the evidence before it that the plaintiff's proposed activity served no compelling public purpose." *Id.* at 39.

In 1988, Palazzolo filed the takings claim at issue here. His original Complaint asserted that the Town of Westerly,

> by virtue of its failure to properly regulate the dumping and discharge of sewerage into Winnipaug [sic] Pond has caused . . . Plaintiff's land to become eroded and flooded and caused what had been Plaintiff's Pond frontage and buildable land to be turned into a natural cesspool which is marshy and unbuildable.

Resp't App. A-27. The Town and CRMC "by their refusal to correct or to allow Plaintiff to correct the problems caused by the discharge and dumping of sewerage and other materials into the pond have deprived Plaintiff of all beneficial use of his property . . . ." *Id.* at A-30.

That Complaint was dismissed for lack of prosecution six years after it was filed, but was later reinstated. *See Palazzolo v. Coastal Resources Management Council*, 657 A.2d 1050 (R.I. 1995). Palazzolo then filed an Amended Complaint in October 1995 that omitted his concerns about too much sewage being allowed to enter the Pond and alleged instead that "as a direct and proximate result of the Defendants' refusal to allow any development of the property, there has been a taking . . . ." J.A. 45, ¶ 17.

In discovery, Palazzolo revealed that he based his takings claim on a plan to develop seventy-four home-sites on the property (a density of approximately four lots per acre). J.A. 48. No longer interested in the proposed recreational facility, he submitted no evidence at trial regarding that facility's value

or feasibility. Instead, his sole evidence about the value of the land was the report and testimony of William Coyle, a real estate appraiser, who based his appraisal on one "comparable" sale that took place two years after the date of the alleged taking. J.L.1 tab 7, at 14. Coyle's appraisal assumed that the subdivision would be built at the density Palazzolo had platted, that engineering and other development costs would be "normal," and that there would be no legal constraints upon the development of the land other than the challenged Regulations. *Id.* at 14-16, 22.

The trial revealed very serious problems with Palazzolo's estimates of the potential value of the land for residential use. The Town of Westerly's zoning does not permit development at the density the appraisal assumed. Pet. App. A-13 n.7. Nor was there any evidence that the septic system permits the appraiser had assumed would be available would in fact be granted. *Id.* Indeed, the evidence suggested otherwise. J.A. 55-57. The State's expert testified that under a realistic estimate of the costs of developing the property, given the engineering difficulties posed by problems of sewage disposal, the net profit from developing the property for a subdivision would be only $55,000. He opined that "the net overall value of $55,000 when you are going to expend in excess of four million dollars in construction costs, would be a great folly because there is too much risk involved for this type of development just to translate to a nominal $55,000 value." *Id.* at 101.

In contrast, he testified that the value of Palazzolo's upland lot at the eastern end of Shore Gardens Road as of 1986, the date of the taking, would be $194,000, after deducting for the costs of making the lot buildable. *Id.* at 103-04. Palazzolo did not contest that evidence. Pet. App. B-5, B-10.

The evidence at trial also showed that the subdivision plan would pose grave environmental threats. Residential use at such a density would likely cause levels of nitrogen in the water to be two and one-half times the federal drinking water standard, and nearly thirty times higher than the concentration believed to cause eutrophication of estuarial waters. J.A. 55-57, 87-90.

It would destroy twelve percent of the salt marsh habitat bordering Winnapaug Pond, and therefore would have a significant impact on the productivity of the pond as a fish and wildlife habitat. *Id.* at 84-85. The evidence also showed that the development would be out of character with the surrounding area because development had been "confined pretty well exclusively to the upland portion . . . that immediately abuts the northern side of Atlantic Avenue." Resp't App. A-36. The few exceptions — "two . . . or several" existing houses built on fill — were "structures that predated [CRMC]." *Id.*

Based on that evidence, the trial judge found that the "plaintiff's proposal would constitute a public nuisance." Pet. App. B-11. He based his finding on "evidence of the probability of an increase in nitrate levels in Winnapaug Pond and the threat to groundwater" and evidence "that high levels of nitrate in groundwater poses a public health threat because groundwater is the sole source of drinking water." *Id.* Judge Williams also found that the State's "uncontradicted" evidence about the value of the property demonstrated that "the plaintiff did not lose all beneficial use" of the property. *Id.* at B-10. Further, he found that "plaintiff has not been prevented nor would he be prevented from developing the [upland portion of the] property," and that plaintiff "is able to pursue a smaller and more appropriate proposal to develop the subject property." *Id.* at B-11 to B-12.

SUMMARY OF ARGUMENT

Palazzolo's applications for special exceptions to fill his wetlands for "erosion control" and a "recreational beach facility" do not constitute meaningful applications for permission to develop the property for residential use, because denial of those applications reveals nothing about how much of the land could be used for home-sites. The applications for fill, along with Palazzolo's denials that he intended to use the land for residential development, shifted attention away from the portions of the property that could be developed without fill. As a result, while the record shows that at least one house could be built on one of the uplands on the property, it reveals neither how many

acres of uplands the property contains nor how many more houses could be built on those uplands. Palazzolo's assertion that some fill is required for economically viable use of the land, and that denial of the applications for special exceptions therefore ripens his claim by revealing that no fill will be permitted, is contrary to allegations of the Amended Complaint, contrary to the trial court's findings, and contrary to this Court's decisions.

Palazzolo's "hide-the-ball" strategy of applying for one thing, then claiming that something entirely different was taken, threatens to undermine administrative processes by allowing applicants to circumvent the rules that federal, state and local regulatory agencies have developed for coordinating their review of permit applications. Further, such a shell-game scheme denies interested parties and the public the opportunity to be heard on the true intended use of the land, and deprives regulatory agencies of critical evidence those parties might offer about the potential nuisance and other harms the intended use of the property would inflict. Regulatory agencies cannot responsibly assess the harms a use of land would impose upon neighbors or the public if property owners are allowed to submit sham applications in order to circumvent the ripeness rules the Court has held are required by the very nature of the Fifth Amendment.

ARGUMENT

I. PALAZZOLO NEVER FILED A *MEANINGFUL* APPLICATION FOR DEVELOPMENT PERMISSION, BECAUSE HE APPLIED TO BUILD A "BULKHEAD" AND A "RECREATIONAL BEACH FACILITY" RATHER THAN THE RESIDENTIAL SUBDIVISION HE NOW CLAIMS WAS TAKEN, AND HE FAILED TO BUILD A RECORD THAT SHOWS HOW MANY HOME-SITES HE COULD DEVELOP ON THE PROPERTY.

A. The Court has consistently required property owners to file a meaningful application for an economically viable project before bringing a takings claim.

For decades, the Court's decisions "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986). In case after case, the Court has made clear that an as-applied takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985); *see also Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136-37 (1978); *Agins v. City of Tiburon*, 447 U.S. 255, 263 (1980); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). *Williamson County* explained that a final decision was mandated "by the very nature of the inquiry required by the Just Compensation Clause" because factors "of particular significance in the [taking] inquiry," such as the "economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations . . . simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply

the regulations at issue to the particular land in question." 473 U.S. at 190-91. *MacDonald* elaborated that "[i]t follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." 477 U.S. at 348.

The first step in securing that determination is for the property owner to apply for the permits necessary for the project the owner wishes to build on the land. In *Agins*, for example, the Court held that an as-applied challenge to zoning ordinances that authorized between one and five single-family houses on the property owner's land was not properly before the Court because the owner had not submitted an application for such housing. 447 U.S. at 262-63; *see also San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 630 (1981) (dismissing appeal for lack of final judgment where state court had been unable to determine whether rezoning land for less intensive use and designating it as open space was a taking because the owner "had not made application to use or improve the property nor has it asked [the] City what development might be permitted.").

The application must be "meaningful." Accordingly, where a property owner submitted an application for "only one intense type of residential development," the Court held that the case was not yet ripe because "rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *MacDonald*, 477 U.S. at 352-53 nn.8-9. The Court explained that the decision of the California Court of Appeal at issue in *MacDonald* "relied on the decisions in *Agins* to illustrate that the property owners there — as here — had not 'attempt[ed] to obtain approval to . . . develop the land' . . . [and] [t]he implication is . . . that a meaningful application has not yet been made." *Id.* at 352-53 n.8 (citations omitted).

Once a meaningful application is filed, the regulatory authorities typically identify impacts that the proposed project

will cause to the surrounding properties, ecosystems, and community, and the property owner typically attempts to minimize or mitigate those impacts through changes in the project design or through remedial mechanisms such as exactions. As the Court has recognized, a property owner may have to reapply in order to respond to problems the regulatory review process revealed about an earlier proposal. *See, e.g., Penn Central*, 438 U.S. at 103-04; *MacDonald*, 477 U.S. at 352-53 nn.8-9. The property owner may also (or alternatively) be required to seek the waiver of standards through variances. *Williamson County*, 473 U.S. at 191.

The Court has consistently and repeatedly required, therefore, that an as-applied takings claim is ripe only if the property owner submits a meaningful application to develop the property, then attempts to respond to the governing agencies' concerns about that application by redesigning the project to reduce or mitigate those concerns and/or (depending upon the facts of the particular case) by seeking a waiver of the prohibitions from which the agency's concerns derive.[4]

B. Palazzolo has not submitted even one meaningful application to use the land for residential development, and his requests for permits for non-residential development are no substitute because denial of those permits does not reveal the extent of the residential use that the agency will allow.

Palazzolo's strategy at trial was to prove that his property had been taken because he had been precluded from filling eighteen acres of wetlands in order to develop a seventy-four unit residential subdivision. His counsel's opening statement in the trial stressed the need for fill to construct homes. J.A. 58. Palazzolo based his claim for compensation upon development of the subdivision, as revealed by his answers to interrogatories,

4. We have addressed the ripeness requirements imposed by the Court's precedents. State courts may apply their own ripeness rules to federal takings claims under the principles set forth in *Johnson v. Fankell*, 520 U.S. 911, 921 (1997).

which alleged a net loss of $100,000 for each of seventy-four home-sites. J.A. 47-48. The only evidence he presented at trial regarding the value of the property was based on the subdivision plan, and his appraiser asserted that the only "alternative value" of the land was to leave the land in its natural state. J.L.1 tab 7, at 14, 26.

There was one fatal error in Palazzolo's trial strategy: Palazzolo had never applied for permits for the residential use he claimed at trial had been taken.[5] Instead, either because he did not understand the basics of land use regulation, or because he was trying to manipulate the regulatory process, Palazzolo approached the permit process with the notion that if he secured a denial of an application for a "special exception" to build a bulkhead or a recreational beach facility on the property, he could use those denials to prove that CRMC would allow no residential use of the property. During the proceedings on those special exceptions, however, he denied that the use he actually sought was residential. J.A. 11; Resp't App. A-24.

The constant confusion in Petitioner's Brief about the nature of Palazzolo's takings claim highlights the fatal inconsistency between Palazzolo's permit applications and his subsequent trial strategy. Petitioner's Brief begins by trying to smooth over the problem: "Mr. Palazzolo expected that approval of [the 1983] application would allow him to proceed with the development of homes on the 74 lots that had been previously subdivided, although the 1983 application was only for the preliminary step of filling the wetlands, not the development of homes."[6] Pet. Br. 6. It then argues that "at trial, Mr. Palazzolo alleged that based on its development potential [as a subdivision], the property had a net value of $3,150,000." Pet. Br. 8. But in an apparent effort to avoid the trial court's finding that the

5. Nor did SGI apply for permits to develop the land as residences.

6. The assertion in Petitioner's Brief is contrary to the record, which shows that Palazzolo denied that his intention was to develop the filled property for residential use. *See infra* at 5, quoting from J.A. 11 and Resp't App. A-24.

environmental and public health consequences of the subdivision would constitute a nuisance, which would be fatal to a taking claim based on the subdivision, Petitioner's Brief changes course, asserting that "the subject of *this* takings inquiry, of course, is an 11.4 acre fill for a beach club that would require no septic systems." Pet. Br. 8 n.4; *see also id.* at 15 n.7. When the fact that Palazzolo never offered any evidence about the economic value of the beach club at trial becomes troublesome, however, Petitioner's brief flips back, arguing that "Mr. Palazzolo, it may be recalled, alleged that the value of his property [if developed as a subdivision] was $3,150,000 at the time it was taken." Pet. Br. 37.

Petitioner tries to escape this muddle by arguing that the applications Palazzolo filed for special exceptions established " 'what use, if any, may be made of the affected property.' " Pet. Br. 20, quoting *MacDonald*, 477 U.S. at 350. But they do not. The denials reveal only that CRMC, true to its Regulations, will not grant a special exception for a bulkhead or a private beach club where the applicant has not met the burdens of proof clearly set forth in the Regulations. They reveal nothing about what uses remain for the property. It may be that a well-conceived project that would provide broad public access to the coast, proposed by a diligent applicant who submitted complete documentation for the project and made reasonable efforts to meet the special exception's burden of proof, could be approved. We do not know, because Palazzolo's proposals were not well-conceived, well-documented, or well-justified.

But even assuming that *no* project would be accepted that required fill of *any* wetlands, we still do not know what uses remain for the land because Palazzolo's special exception strategy asked CRMC to focus only on the wetlands, not on the upland portions of the property. His applications contained no survey or topographical map that would even reveal how much upland is contained in the property.

Although Petitioner's Brief asserts that only one home would be permitted on the uplands, Pet. Br. 13, the record reveals otherwise. CRMC Director Fugate, testified on behalf of CRMC

that he knew of "upper upland portions . . . at the road that abuts the pond" but that, "because we don't have an accurate or detailed survey, there may be other upland portions . . . ." Resp't App. A-36. Fugate then was asked by Palazzolo's counsel:

> Q. So we can put a house on where it appears to be lot number twenty?
>
> A. Or somewhere around there. . . . There may also be, if I can just look at this, there may be some upland area on the backside of 80 through 75.
>
> Q. So you are saying it's theoretically possible we can put one house on Lot 20, and, depending upon where the coastal feature goes, perhaps a house up in the area of Lot 80 or 79?
>
> A. Or one — or I don't know how many. . . .
>
> Q. . . . . Now, you've indicated that there is a potential that we can build on two, perhaps three, perhaps four of the lots, correct?
>
> A. Perhaps . . .

Id. at A-38 to A-39. Later, Fugate testified that "based on my discussions with . . . [Russell Chateauneuf, of the Department of Environmental Management's ISDS section, and David Reis, CRMC's Principal Environmental Scientist], and my review of the site, the site has two uplands areas." *Id.* at A-42.

Accordingly, on this record, even after trial, we do not know how many acres of uplands there are on the property and how many houses, beyond the one everyone agrees on, could be built on each of those uplands. Petitioner's assertion that we know that "the 'extent' [of permitted development] is one home confined to the upland portion . . . ," Pet. Br. 13, is simply false. Indeed, it is inconsistent even with Petitioner's acknowledgment just a few paragraphs earlier that the Supreme Court of Rhode Island had "observ[ed] that Mr. Palazzolo could build *at least* one single-family home on the existing upland area.' " *Id.*, quoting Pet. App. A-11 (emphasis added).

Although the evidence is uncontested that the value of one home-site in 1986 was approximately $200,000, we do not know

the total economic value of Palazzolo's parcel if all the uplands were sold as home-sites. We do not know because Palazzolo never asked the relevant agencies to consider whether residential uses could be accommodated on the property.

C. Palazzolo's allegation that CRMC's refusal to allow "any" development deprived him of all beneficial use does not excuse his obligation to submit a meaningful application for the development he now claims is the only beneficial use of the property.

Petitioner's Brief attempts to escape the lack of evidence regarding the extent of residential use permitted on the upland property by arguing that further applications would be "pointless." Pet. Br. 18. CRMC's response to any application for residential use of the upland portions of the property would be "legally irrelevant," Petitioner argues, *id.*, because Palazzolo alleges "that he can realize no economically viable use of his property *unless he can develop some of the wetlands.*" *Id.* at 10 (emphasis added). Petitioner's argument involves a creative rewriting of Palazzolo's claims, and is inconsistent with the trial court's findings and with the Court's holding in *MacDonald* and earlier cases.

Palazzolo's Amended Complaint alleges:

> 15. As a result of the CRMC's *denial of Palazzolo's right to develop the property*, Plaintiff has been denied economically, beneficial use of his property from the time it was purchased in 1962. . . .
>
> 17. As a direct and proximate result of the *Defendant's refusal to allow any development of the property*, there has been a taking of private property for public use without just compensation.

J.A. 45 (emphasis added). Those allegations do not distinguish between the wetland and upland portions of the property, but focus instead on the supposed refusal to allow *any* development and the supposed absolute denial of Palazzolo's right to develop "the property."

The allegations in Palazzolo's Amended Complaint are virtually identical to those at issue in *MacDonald*, where the Court held the claim was not ripe after noting: "Appellant does not contend that only improvements along the lines of its 159-home subdivision plan would avert a regulatory taking. *Rather, the complaint alleged that appellant was deprived of all beneficial use of its property.*" 477 U.S. at 352 n.8 (emphasis added). Petitioner's Brief seeks to escape that second sentence by asking the Court to consider "a scenario in which the property owner in *MacDonald* had indeed alleged that 'only improvements along the lines of its 159-home subdivision plan would avert a regulatory taking.' " Pet. Br. 18. This implies that Palazzolo's situation is like that hypothetical. But the allegation in Palazzolo's Amended Complaint is not the one given in the hypothetical; instead, it is virtually the same as the allegation the *MacDonald* Court refused to consider ripe.

Further, like the state courts in *MacDonald*, 477 U.S. at 345, 352 n.8, the trial court here rejected the allegation, finding that "plaintiff . . . failed to prove that he was denied all beneficial use of the subject property," Pet. App. B-9, and that plaintiff "is able to pursue a smaller and more appropriate proposal to develop the subject property." *Id.* at B-12. Palazzolo therefore is in exactly the same situation as the plaintiff in *MacDonald*. Just as it did in *MacDonald*, the Court should refuse to allow the property owner to circumvent ripeness rules with mere allegations that no economically viable use is left in the property.

Indeed, the Court has repeatedly rejected such a ploy. In *Penn Central*, for example, the property owners "urged that the Landmarks Law has deprived them of *any gainful use* of their 'air rights' above the Terminal . . . ." 438 U.S. at 130 (emphasis added). The Court nevertheless found that the claim about "the effect of the law on their ability to make use of the air rights" was not ripe because they had not "sought approval for the construction of a smaller structure." *Id.* at 136-37. In *Williamson County*, the Court held that the case was not ripe because the property owner had not applied for available variances, even though the jury had found that the denial of

subdivision plat approval denied the owner economically viable use of the property. 473 U.S. at 182.

Similarly, the lower federal courts and state courts have not allowed claimants to avoid ripeness requirements simply by alleging that the challenged action leaves no economically viable use of the land. In *Kinzli v. City of Santa Cruz*, 620 F. Supp. 609, 622 (N.D. Cal. 1985), for example, the district court reached the merits of an as-applied taking challenge to a greenbelt ordinance even though no application to develop plaintiff's land had been completed, but rejected the challenge after finding that the ordinance left beneficial uses for the property. The Ninth Circuit reversed. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, *amended by* 830 F.2d 968 (9th Cir. 1987). Noting that the trial court excused the need for an application after finding that no plan could possibly be approved under the regulations that would "still interest . . . potential purchasers," the Ninth Circuit held that ripeness should not be determined "by inquiring whether any beneficial use remains." 818 F.2d at 1454 (internal citations omitted). That standard "would require courts to speculate as to what potential uses may be lurking in the hopes of the property owner and in the minds of developers and city planners. This would result in the same sort of speculation that the ripeness doctrine prohibits." *Id. See also, e.g., Kaiser Dev. Co. v. City and County of Honolulu*, 649 F. Supp. 926, 942 n.21 (D. Haw. 1986) (finding takings claim was not ripe because plaintiffs seeking to build a resort had not submitted a development plan for any of the less intensive uses allowed under the property's "preservation" zoning, and an allegation that none of those uses was economically viable could not ripen the claim), *aff'd*, 898 F.2d 112 (9th Cir. 1990); *Larson v. Multnomah County*, 854 P.2d 476, 479 (fact that property owners claimed that none of the possible alternative uses would be economically beneficial, rather than that none would be permitted, "does not change the [ripeness] analysis"), *clarified on reconsideration*, 859 P.2d 574 (Or. Ct. App. 1993).

The two cases Petitioner cites to the contrary do not support his argument. Pet. Br. 18. In both *Greenbrier, Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989), and *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999), the property owners had submitted several modifications of their original proposals and had engaged in extensive negotiations with the regulatory authorities before filing their constitutional claims. In *Greenbrier*, the Eleventh Circuit noted that, because the "City has effectively conceded that the only alternative plan of development would have been under the existing [single-family] zoning," there was no uncertainty about the level of development that would be permitted. 881 F.2d at 1576. In *Mayhew*, the Texas Supreme Court found that under the "unique circumstances" of the case, in which the town rejected a compromise over the density of the project that had been "determined through negotiations between the developer and the town," the property owner should not be "required to submit additional alternative proposals, after a year of negotiations and $500,000 in expenditures, to ripen this complaint." 964 S.W.2d at 932. The *Mayhew* court did note that the owner alleged that any reductions in density beyond what it had already given up in the negotiated compromise would not be viable, *id.* at 931, but the court did not hold that such an allegation, without more, could satisfy ripeness requirements. Instead, the court repeatedly stressed "the extent to which the Mayhews worked with the Town in attempting to have their development approved." *Id.*

In contrast to the unusually extensive negotiations over the subdivision proposals involved in both *Greenbrier* and *Mayhew*, Palazzolo has never submitted even one application for the development he now claims is the only economically viable use of the land, much less ever modified his plans to accommodate concerns about the harms that development would cause. The cases Petitioner cites accordingly are inapposite, and in any event do not stand for a general rule that a property owner can ripen its claim merely by alleging that any use other than

the one the owner proposes would be economically infeasible. Such a rule would destroy the carefully crafted doctrines the Court developed over the course of several decades to ensure that courts "know[] the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald*, 477 U.S. at 351.

Such a departure from the Court's precedent would open the door to enormous inefficiency and unfairness. If property owners can escape the ripeness requirement simply by alleging that the first proposal that is denied was the only economically viable use of the land, courts will be flooded with cases likely to be found without merit under the Court's takings doctrines, but only after both regulatory authorities and courts have wasted considerable time and resources on premature litigation. Indeed, even in the two cases Petitioner cites, the property owner's allegations that no economically viable use remained for the property were rejected on the merits. Pet. Br. 19 n.8, citing *Mayhew*, 964 S.W.2d at 937, and *Greenbrier*, 881 F.2d at 1577-80.

Petitioner's strategy for circumventing ripeness rules would empower property owners to survive motions to dismiss and use the threat of trial to chill state and local officials from exercising their land use and environmental protection authority.[7] It is no answer, as Petitioner suggests, that meritless

7. It is revealing that one of the *amici* in support of Palazzolo, the National Association of Home Builders (NAHB), nas touted the intimidating effect that loosening *Williamson County's* ripeness requirements for takings cases would have on state and local officials. NAHB approvingly described a bill that attempted to alter ripeness standards: "This bill will be a hammer to the head of these [state and local] bureaucracies." Jerry Howard, NAHB's chief lobbyist, quoted in Brody Mullins, *Property Takings Bill Set For House Fight*, National Journal's CongressDailyAM (Mar. 14, 2000). For an analysis and history of the legislation NAHB was discussing, see Glenn P. Sugameli, *"Takings" Bills Threaten People, Property, Zoning, and the Environment*, 31 Urb. Law. 177 (1999).

claims will eventually be "dismissed" because of evidence at trial from "appraisers and economists and the like . . . ." Pet. Br. 19. Especially for the many small towns that exercise land use authority, a takings trial can be so expensive that even an eventual victory on the merits is a serious threat to their budgets, and therefore a serious deterrent to rigorous review of development proposals.[8]

Further, in this case, both the trial court and the Supreme Court of Rhode Island already have rejected Palazzolo's claim that denial of the fill permit deprived him of all beneficial use of the land. Pet. App. A-11, B-10. CRMC's expert appraiser found that the 1986 value of just one home-site would be almost $200,000, after deductions for the cost of engineering and road upgrades to make the site suitable for development. The trial court found that the State's evidence was uncontradicted. Pet. App. B-5, B-9 to B-10. There is no evidence regarding the additional value of the other home-sites the record reveals might be developed, but the combination of the evidence about the value of the one home-site everyone agrees could be developed and the evidence that several more home-sites might be suitable for development leaves no doubt that the land has considerable economic value.[9]

This case therefore would be a particularly inappropriate vehicle for revisiting the ripeness rules the Court has carefully fashioned to ensure that the courts can accurately "resolve the

8. *See* Senate Committee on the Judiciary, The Private Property Rights Implementation Act of 1998, S. Rep. No. 105-242 at 30, 32, 35-37, 40-47 (1998) (minority views).

9. To put the value of the land in perspective, even if $200,000 were the total value of the land in 1986, Palazzolo's return would be more than twice what he would have earned had he invested the purchase price of the property in the stock market. If Palazzolo had invested the $8000 he paid for the property in 1959, and the $5000 SGI paid in 1969, in S & P 500 stocks, he would have had a portfolio worth $96,134 in 1986, assuming that he had reinvested both income distributions and capital appreciation. *See* Ibbotson Associates, Stocks, Bonds, Bills, and Inflation 1997 Yearbook, Table C-1.

difficult problem of . . . how to distinguish the point at which regulation becomes so onerous" that it effects a taking for which compensation must be paid. *Williamson County*, 473 U.S. at 199; *see also MacDonald*, 477 U.S. at 349. To require Palazzolo to submit an application for residential use that the evidence at trial revealed was economically viable is hardly pointless. To insist that he submit an application for residential use so that the record is clear regarding how many home-sites can be developed on the land is not to demand "legally irrelevant" applications. Instead, the Court's long-established ripeness rules correctly require that Palazzolo apply for the use he actually intends to develop (or intends to use as the basis for his takings claim), and follow the agency's permitting procedures so that those procedures can reveal "the nature and extent of permitted development." *MacDonald*, 477 U.S. at 351.

D. Palazzolo did not prove that a proposal to develop upland portions of the property would be futile.

Petitioner's claim that an application for residential development would have been "pointless" is at bottom, a claim that the application would be "futile." Some lower federal courts have recognized a "futility" exception to the ripeness requirements. *See, e.g., Herrington v. County of Sonoma*, 857 F.2d 567 (9th Cir. 1988). Palazzolo has failed completely, however, to meet the standards those courts have established for the futility exception.

Courts recognizing the futility exception have consistently required the property owner to bear the burden of proving that applications to develop the property would be futile. *See, e.g., Gilbert v. City of Cambridge*, 932 F.2d 51, 61 (1st Cir. 1991) ("Since obtaining a final municipal decision should be the rule, however, the burden of establishing futility must lie with the party seeking to bypass the permit procedure — and any reasonable doubt ought to be resolved against that party."). Those courts also have insisted that futile means more than "unlikely." In *Gilbert*, for example, the First Circuit insisted that "the mere possibility, or even the probability, that the

responsible agency may deny the permit" should not trigger the futility exception. *Id.* Instead, "a sort of inevitability is required: the prospect of refusal must be certain (or nearly so)." *Id.*

Similarly, the Court of Federal Claims has held that "rigorous statutory criteria [for approving a development permit], without more, would not be enough to trigger [the futility] exception." *Greenbrier (Lake County Trust Co. No. 1391) v. United States*, 40 Fed. Cl. 689, 702 (1998), *aff'd*, 193 F.3d 1348 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 2740 (2000). Indeed:

> [E]ven if plaintiff showed an objective probability of denial on the merits . . . the application process could not thereby be characterized as "futile." A plaintiff cannot plead futility whenever faced with long odds or demanding procedural requirements. Administrative obstacles to the securing of a permit — such as negative agency comments or statutory presumptions — do not automatically exonerate a plaintiff from all responsibility to see the application process through to its end.

Heck v. United States, 37 Fed. Cl. 245, 252 (1997), *aff'd*, 134 F.3d 1468 (Fed. Cir. 1998).

Palazzolo has not even demonstrated "long odds," much less "inevitability." CRMC Director Fugate testified that he believed "there is a potential that we can build on two, perhaps three, perhaps four of the lots." Resp't App. at A-39. He further testified that "an ISDS system should be able to be designed and approved in the area of Lots 127, 128, and a potential one or two ISDS systems should be able to be constructed behind 68 and 71 in that area." *Id.* at A-43. When asked if it was reasonable to expect that variances would allow development on the upland lots with ISDS systems, Fugate replied "I felt that they were realistic to apply for those locations. I then discussed it [with] Mr. Chateauneuf [of the ISDS section of the Department of Environmental Management], and he gave me supporting information saying that it made sense." *Id.* at A-44. Mr. Fugate's uncontradicted testimony shows that an application

for some residential use (albeit not the grandiose seventy-four unit subdivision Palazzolo hopes for) would be far from futile or pointless.

II. SANCTIONING PALAZZOLO'S END-RUN AROUND THE MEANINGFUL APPLICATION REQUIREMENT WOULD UNDERMINE THE EFFICIENCY, FAIRNESS AND ACCURACY OF REGULATORY PERMITTING PROGRAMS.

Palazzolo's strategy for ripening his takings claim by applying for special exceptions for uses other than the residential development he now claims is the only economically viable use of the land threatens the integrity of regulatory permitting programs. His strategy flaunts the procedures that federal, state and local regulators have developed to provide a logical and efficient system of coordinated review of development proposals. Further, his strategy deprives neighboring property owners and other interested parties of notice and an opportunity to be heard about the impacts of the development the property owner claims is the only economically viable use for the land. Most importantly, Palazzolo's ploy would prevent regulators from accurately assessing the full extent of the nuisance and other harms the owner's intended use of the land would impose upon neighboring properties and the general public.

Because the permit review procedures for residential use of the land are more detailed than those required for non-residential uses, Palazzolo was able to cut corners considerably by hiding his true intentions for the land. Before submitting an application for residential use, for example, an applicant must obtain a local building permit and an individual sewage disposal system (ISDS) permit from the Rhode Island Department of Environmental Management (DEM). Resp't App. A-19 to A-22. CRMC will not even notice for public hearing an application for residential use that does not contain those prerequisite permits. J.A. 66. By declaring that his intended use of the property was not residential, and that "no sewage disposal systems are being applied for," J.L.1 tab 5, Palazzolo

managed to get his application to a hearing and before CRMC without satisfying the requirements for building and sewage system permits. To apply for a sewage system permit, for example, Palazzolo would have needed to submit a "topographic map of the details of the lots proposed, percolation testing, ground watertable testing and an indication of the location of wetlands, and certain certifications, and if necessary, also assessment on environmental impacts," as well as details of the septic system design proposed. J.A. 51; *see also id.* at 66.

For several reasons, Palazzolo's ploy, if accepted, would seriously undermine the efficiency, accuracy, and fairness of the administrative procedures used by government agencies around the country to review development proposals. First, Palazzolo's scheme circumvented the coordinated system of review that federal, state and local agencies with authority over land use and environmental regulation have established to ensure that their evaluations of permit applications proceed efficiently and logically. Here, state officials decided that CRMC should not incur the expense of considering an application for development of wetlands or coastal property if the local zoning authorities would not allow the proposed development under applicable zoning or building code regulations. A residential development's impact on the environment and on public health and safety depends in large part upon the type of sewage disposal system the development will employ. The State therefore also decided that CRMC should not consider applications for residential permits until DEM's review procedures revealed the nature of the disposal system, if any, that DEM would approve.

In designing its system of environmental and land use regulations, a State should be free to determine the sequence in which permits must be obtained. That sequence matters. It is critical both to the accuracy and efficiency of an agency's assessment of an application and to a State's allocation of resources for evaluating applications, enforcing permit requirements, and defending permit denials. Further, if several different agencies each might deny a permit, and therefore might face liability if the permit denial effects a compensable taking,

the State should be free to determine which of the agencies should bear primary responsibility for defending against any takings claims. Palazzolo's ploy would arrogate those determinations to the property owner, rather than to the State. The Court should not sanction that move by altering ripeness rules to reward property owners for hiding their intended use of the land in order to evade the orderly processes a State has established.

Second, Palazzolo's strategy threatens the fairness of the permitting system. Neighboring property owners and the general public must be given notice and an opportunity to be heard on the substance of most development proposals. If a property owner can apply for one use, but later sue for the alleged taking of a different use, the owner will be able to avoid a public hearing on the use claimed to be a taking. That may very well violate neighbors' due process rights. *Cf. Paquette v. Zoning Bd. of Review*, 372 A.2d 973 (R.I. 1977) (nullifying a decision granting a special exception because the public notice was inaccurate). The fairness of the land use regulatory system depends upon the openness of the process, and the guarantee that all interested parties will have an adequate opportunity to bring concerns about a proposed land use change to the attention of regulatory authorities. *See, e.g.*, Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Cal. L. Rev. 837 (1983); Eric H. Steele, *Participation and Rules — The Functions of Zoning*, 1986 Am. B. Found. Res. J. 709. Palazzolo's "hide-the-ball" scheme would short-circuit that guarantee.

Third, depriving interested neighbors and the public of an adequate opportunity to speak out about the intended use of the land will deny the agency valuable information about both the effects of the intended use and the effects of denying the permit. In this case, testimony or comments of neighbors specifically addressed to the residential subdivision would have been especially important for the agency's consideration of whether, as the trial court ultimately found, relatively high density

residential use on fill would create a nuisance.[10] That determination is critical to the agency's ability to perform its statutory mandate to protect the public health and safety and to "protect the natural environment." R.I. Gen. Laws § 46-23-1. The determination of whether a residential subdivision would constitute a nuisance also is critical to an agency's assessment of its potential liability to persons harmed by any development the agency may permit. *See, e.g.*, Christopher City, Note, *Duty and Disaster: Holding Local Governments Liable for Permitting Uses in High Hazard Areas*, 78 N.C.L. Rev. 1535, 1545-46 (2000) (reviewing case law on a government's liability for permitting a land use that creates a nuisance).

Determining whether a particular land use will cause a nuisance also is vitally important for an agency assessing its potential liability under the Takings Clause, given the principles set forth by the Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). Palazzolo's end-run around a full public hearing on residential use of the land denied CRMC crucial information about the potential burdens such residential use would impose upon neighbors and the general public. It is ironic that Palazzolo's original Complaint alleged that CRMC had taken his land by allowing too much sewage to flow into Winnapaug Pond, Resp't App. A-27, but his strategy here would mean that CRMC could be held liable for taking his "right" to build a subdivision, even though CRMC never had occasion to hold a public hearing on the potential impacts the sewage from the subdivision would have on the Pond.

Palazzolo's shell-game strategy makes it much more difficult for regulators to assess whether the grant of a permit

10. In this case, CRMC was able to prove at trial that the planned subdivision would be a nuisance. Pet. App. B-10 to B-11. But if the Court were to allow property owners to avoid a public hearing on the use claimed to have been taken, many regulators would undoubtedly find the burden of proving a nuisance more difficult or more expensive in the absence of a public hearing that focused the attention of neighboring property owners, environmental organizations, and other interested parties on a specific proposal.

will unduly harm the public interest. It also interferes with regulators' ability to evaluate the effects of prohibiting a particular development proposal. Where a landowner has claimed throughout the administrative process that he wants to put the land to a relatively low-profit use that would not require prerequisite approvals from other authorities, the agency's estimate of the effects of denying a permit will be too low. If the agency tries to guess what the owner's true intentions are, its guess will involve speculation not only about the type, intensity and design of the intended use, but also about the probability that the intended use would be allowed by other authorities (whose processes were short-circuited by the applicant's strategic proposal). Palazzolo's strategy thus denies accurate data to regulatory agencies that factor the effect of prohibiting development into their analysis, or that wish to estimate their potential liability in the event that denial of a permit may require compensation.[11]

Administrative agencies must be able to count on the accuracy and truthfulness of the application before them when they assess the harms the application poses to neighbors and the public. Agencies cannot arrive at the best judgment about whether to permit a land use if landowners are allowed to apply for one type of development, then sandbag regulators by

11. In considering the costs of denying a permit, regulatory authorities must be able to assess whether the land may be put to profitable uses that would be less harmful than the use proposed. Again, however, a "hide-the-ball" strategy interferes with that assessment. Here, for example, Palazzolo's applications for special exceptions to fill wetlands for non-residential use resulted in a record that failed even to identify how many acres of the parcel could be developed without fill. As the Court recognized in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981), one of the happy by-products of the ripeness rules is that the process of securing a final decision provides opportunities for the parties to resolve their dispute outside the courts. A "hide-the-ball" strategy makes it much less likely that the parties can identify and agree upon economically viable uses of the land that would cause less harm to the environment than the owner's ideal development.

asserting a takings claim for something completely different. Whether Palazzolo was acting strategically, or merely misunderstood the nature of land use and environmental regulatory processes, the Court cannot sanction his attempted end-run around the ripeness rules without severely compromising the integrity of the processes that agencies charged with enforcing federal, state and local land use and environmental laws use to review development proposals.

CONCLUSION

For the foregoing reasons the judgment of the Supreme Court of Rhode Island should be affirmed.

Respectfully submitted,

VICKI L. BEEN
Counsel of Record
c/o NEW YORK UNIVERSITY
SCHOOL OF LAW
40 Washington Square South
Suite 314-H
New York, New York 10012
(212) 998-6223

GLENN P. SUGAMELI
NATIONAL WILDLIFE FEDERATION
1400 16th Street, N.W
Suite 501
Washington, DC 20036-2266
(202) 797-6865

Attorneys for Amici Curiae